Nos. 01-10873, 02-5034

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In The
Supreme Court of the United States

KHANH PHUONG NGUYEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TUYET MAI THI PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THOMAS K. MOORE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Thomas K. Moore is a territorial district judge of the District Court of the United States Virgin Islands.[1] Moore has lived and practiced law in the Virgin Islands for more than twenty-seven years. In the routine exercise of the judicial power of the United States, he and the other three territorial district judges, Raymond Finch (VI), John Umpinco (Guam) and Alex Munson (CNMI), adjudicate disputes between their appointing authority – the executive branch of the United States – and their local governments, corporations, and individuals. They decide all disputes to the best of their ability without regard to any impact a decision may have on reappointment after their ten-year terms. These territorial district judges are appointed by the President and confirmed by the Senate to exercise the very same Article III jurisdiction a United States district judge wields in a State. Accordingly, they should never have to consider, if only to dismiss, the possible impact of their decisions on their reappointments. Moreover, the mere perception that territorial judges might be subject to political pressure undermines the public's confidence in the independence of the judiciary.

The lack of full Article III status of the territorial federal judges is but one aspect of the lesser status of

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[1] In conformity with Supreme Court Rule 37.3(a), *amicus* has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amicus* also states, pursuant to Supreme Court Rule 37.6, that no party or counsel for a party has authored this brief in whole or in part, and that no person or entities other than *amicus* and counsel have made a monetary contribution to the preparation or submission of this brief.

United States citizenship in the unincorporated territories. The territories and possessions are the last locations within the United States in which Congress and the Executive can legally discriminate against a United States citizen because of her place of birth and location. A citizen located in an unincorporated territory has no constitutional right to a criminal or civil trial by jury, to indictment by grand jury, or to trial before a fully independent Article III judge. The unsupportable basis for the continued second-class citizenship in the unincorporated territories was wholly judge-crafted in a series of racially and culturally prejudiced cases. Known as the *Insular Cases*, these decisions began in 1901 with *Downes v. Bidwell*, 182 U.S. 244, and concluded in 1922 with *Balzac v. Porto Rico*, 258 U.S. 298. Having dealt with the consequences of the *Insular Cases* for the past ten years, Moore has first-hand familiarity with the issues petitioners have raised. His arguments in this brief are based on this expertise and careful review of this Court's decisions. Moore's interest in this litigation is to support the principle of equality under the law and to secure the application of Article III of the Constitution for the benefit of the loyal United States citizens who reside in the unincorporated territories. He submits this brief solely on his own behalf and not in his official capacity as judge of the District Court of the Virgin Islands.

SUMMARY OF ARGUMENT

The designation of the Honorable Alex Munson, judge of the District Court of the Commonwealth of the Northern Mariana Islands ["CNMI"], to sit on a panel of the Court of Appeals for the Ninth Circuit does indeed raise significant constitutional questions, most importantly the

continuing validity of the *Insular Cases* and the so-called plenary power of Congress to violate Article III in three remaining insular territories – Guam, the CNMI, and the Virgin Islands. Congress has circumvented Article III by granting the territorial district judges[2] the jurisdiction of United States district judges, whereby they in fact exercise the "judicial Power of the United States," without giving them the full protection under Article III of appointment during good behavior and compensation that Congress cannot diminish. It is not true, as petitioners argue, that only judges possessing these two attributes may exercise Article III judicial power. Judge Munson and the three other territorial judges exercise the judicial power of the United States day in and day out. This Court should reject the racially and culturally biased decisions of a different era and overrule the *Insular Cases*, at least to the extent of curtailing the power of Congress under Article IV to create *de facto* Article III courts in these three possessions without the full scope of judicial independence required by Article III.

In 1962, this Court ruled that the judges of tribunals created by Congress to carry out its Article I functions of paying the debts of the United States and collecting taxes and duties were Article III judges. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). This Court should similarly hold that the territorial judges are Article III judges. These judges presently possess all of the essential attributes of Article III

[2] The terms "territorial judges" and "territorial district judges" refer to the federal judges appointed to the district courts of Guam, the CNMI, and the Virgin Islands, as established by Congress in Title 48 of the United States Code. By statute, these territorial judges serve ten-year terms and receive the same compensation as a U.S. district judge.

United States district judges under the criteria of the Court's precedent, with the exception of life tenure and constitutionally protected compensation. These characteristics Congress cannot withhold under the Constitution. The territorial judges exercise only powers of a judicial nature in constitutional cases and controversies. They have no extrajudicial administrative or legislative powers, and their decisions are not subject to extrajudicial revisory authority incompatible with the limitations on the judicial power of the United States contained in Article III of the Constitution. These judges have the same exacting responsibilities as all other United States district judges. The only distinction between the district judges exercising federal jurisdiction in the territories and the judges of the United States district courts in the States is that Congress has plenary power over the former. Once the *Insular Cases* are overruled, this distinction will evaporate. This Court should welcome the opportunity to relegate the *Insular Cases* to the dustbin of our prejudiced past alongside Jim Crow laws and the doctrine of "separate but equal."

The 1828 statement of Chief Justice Marshall in *American Insurance Co. v. 356 Bales of Cotton* [*Canter*], 26 U.S. (1 Pet.) 511 (1828), that territorial judges are incapable of receiving the judicial power of the United States, has also been overtaken by time and changed circumstances and was rejected by this Court in *Glidden*. The Congress has in fact anointed the remaining four territorial judges with the judicial power of the United States, and these judges have in fact been exercising that Article III judicial power for many years. This Court should rule that the *Insular Cases* erroneously purported to grant Congress plenary power over what this Court proclaimed to be "unincorporated territories" and hold that Congress has established *de facto* Article III territorial judges without

including all of the attributes required by Article III. It is past time for this Court to curtail the so-called plenary power of Congress over the territories as it applies to Article III and to declare that the four territorial district judges are in fact and law Article III judges.

ARGUMENT

I. THE RACIALLY BIASED *INSULAR CASES* MUST BE OVERRULED TO THE EXTENT THAT THEY BAR THE APPLICATION OF ARTICLE III TO THE TERRITORIES

The bedrock constitutional principle of mutual independence and separation of the legislative, the executive, and the judicial departments of the federal government is routinely violated in the unincorporated territories and possessions of the United States. Article III provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for thier Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art III, § 1. The *Insular Cases*[3] permit Congress to circumvent Article III of the Constitution by

[3] Also known as the *Insular Tariff Cases*, eight Supreme Court cases decided in 1901 make up the core *Insular Cases*: *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901);

(Continued on following page)

allowing the President to appoint non-life tenured territorial district judges in Guam, the CNMI, and the Virgin Islands. These judges exercise the judicial power of the United States without full constitutional assurance of independence and protection from the coercive influence of the Executive and Congress.

Over 100 years ago, just after the Spanish-American War, this Court fashioned in the *Insular Cases* the doctrine of the "unincorporated territory" to accommodate the acquisition of several non-contiguous insular territories populated by non-white, non-Anglo-Saxon, non-European people. The Court reasoned that these island territories, including Puerto Rico and the Philippines, were populated by peoples who were incapable of coping with the sophistications of democratic and republican forms of government because their racial and ethnic heritages differed so

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Dooley v. United States, 182 U.S. 222 (1901) (*Dooley I*); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901) (*Dooley II*); and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

A second set of cases, decided between 1903 and 1914, further developed the *Insular Cases*: *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914). The series culminated in 1922 with *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See* Christina Duffy Burnett, *A Note on the Insular Cases in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389 (Christina Duffy Burnett & Burke Marshall, eds., 2001).

radically from the majority population of the United States at the turn of the Twentieth Century.[4]

As a distinguished constitutional scholar has noted, the

> *Insular Cases* should be placed . . . within the sadly rich history of American racism or, perhaps more to the point . . . , the view that to be a "true American" one had to share certain racial, religious, or ethnic characteristics.[5] No one can read *Downes* without realizing the extent to which the "un-Americanness" of the people in the new American territories is fundamental to the outcome.

Sanford Levinson, Installing the *Insular Cases* into the Canon, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 131 (Christina

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[4] Guam and the Virgin Islands have been declared by Congress to be unincorporated territories of the United States, *see* 48 U.S.C. §§ 1421a (Guam), 1541(a) (Virgin Islands). The CNMI, for purposes of this brief, is treated as an unincorporated territory insofar as the judge of the District Court of the Northern Mariana Islands exercises the same judicial Power of the United States. Puerto Rico is not discussed here because its equivalent territorial judges already are full Article III judges.

[5] *See generally* Rogers Smith, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 3 (1997) (noting, for example, the presence of an influential ideology, especially prevalent, during the period of the *Insular Cases*, that "America was by rights a white nation, a Protestant nation, a nation in which true Americans were native-born men with Anglo-Saxon ancestors").

Levinson, at 138 n.44.

Duffy Burnett & Burke Marshall, eds., 2001) (footnote in original).

A new theory was therefore developed to ensure that the Constitution did not "follow the flag," and that the newly acquired lands inhabited by these alien people would not automatically become States of the Union.[6] Justice Brown first articulated the unincorporation doctrine:

> If those possessions are *inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought*, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.
>
> We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution. . . .

Downes v. Bidwell, 182 U.S. 244, 287 (1901) (Brown, J.) (emphasis added).[7]

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[6] *See* Hon. Jose A. Cabranes, *Puerto Rico: Colonialism and Constitutional Doctrine*, 100 HARV. L. REV. 450 (1986).

[7] Additional quotes directly from the *Insular Cases* demonstrate the intrinsically racist imperialism of a previous era of U.S. colonial

(Continued on following page)

Justice Brown, and ultimately the full Court, found the following proposition to have been established by precedent: "that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it." *Id.* at 267. The primary precedent relied on was Chief Justice Marshall's statement that the territorial judges in the then territory of Florida were not judges on "which the judicial power conferred by the Constitution on the general government[] can be deposited. They are incapable of receiving it." *American Ins. Co. v. 356 Bales of Cotton* [*Canter*], 26 U.S. (1 Pet.) 511, 546 (1828).[8]

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expansionism embodied in these outdated and universally criticized decisions:

> [Even] if these inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, *whether savages or civilized*, are such, and entitled to all the rights, privileges and immunity of citizens. If such be their status, the consequences will be extremely serious.

Downes, 182 U.S. at 279 (Brown, J.) (emphasis added).

On the right to jury trial in the Philippines, the Court observed:

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends . . . [and i]f the United States, *impelled by its duty or advantage, shall acquire territory peopled by savages* . . . , it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice.

Dorr, 195 U.S. at 148 (emphasis added).

[8] Justice Brown in *Downes* chose to follow *Canter*, rather than Chief Justice Marshall's statement eight years earlier in *Loughborough v. Blake*, 18 U.S. 317 (5 Wheat.) 317 (1820), that the power to tax given to Congress under Article 1, § 8, of the Constitution extends throughout the United States, "which is composed of States and territories." *Id.* at 319.

It is essential to keep in mind that the same Justices who decided the *Insular Cases* had announced several years earlier the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which has been thoroughly repudiated and overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954). Many of the same racial and cultural attitudes and prejudices underpin the reasoning of both doctrines. More enlightened members of this Court recognized in *Brown* that attitudes evolve over time and that the "common wisdom" on the psychological impact of separate schools on African-American children was different in 1954 than when *Plessy* was decided in 1896.[9]

Not surprisingly, the *Insular Cases* have been severely criticized because they are based on racist and ethnocentric precepts that violate the very essence and foundation of our system of governance, as embodied in the Declaration of Independence and repeated over and over in such documents as the Gettysburg Address and the Civil Rights Laws. *See, e.g., Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring); *Reid v. Covert*, 354 U.S.

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[9] Further evidence that the *Insular Cases* simply cannot withstand any reasoned and principled analysis is Justice Brown's suggestion that among the "artificial or remedial rights" in the Constitution that are "unnecessary to the proper protection of individuals" and would not apply in an unincorporated territory is the right to a particular method of procedure, such as the right to jury trial. He wrote that this right is "peculiar to Anglo-Saxon jurisprudence, and . . . [had] already been held by the states to be unnecessary to the proper protection of individuals." *Id.* at 282-83. This Court has since held that the right to jury trial is a fundamental right incorporated in the Fourteenth Amendment's Due Process Clause and thereby applicable to the States. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1958), *overruling Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

1, 14 (1957) (plurality opinion) ("[I]t is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."). The *Insular Cases* have never been repudiated, however, and continue to deprive United States citizens in Guam, the CNMI, and the Virgin Islands of their constitutional right to fully independent United States district judges. The *Insular Cases* have allowed Congress to anoint territorial judges with the judicial power of the United States without also cloaking them with the full independence Article III requires.[10]

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[10] These cases affect life in the territories in many other pernicious and detrimental ways. A basic principle of the *Insular Cases* is that "[i]t is locality that is determinative of the application of the Constitution, in such matters as judicial procedure [*e.g.*, trial by jury], and not the status of the people who live in it." *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922). Even citizens born in a State of the United States are stripped of their constitutional right to jury trial and indictment by grand jury as soon as they get off the plane in Guam, the CNMI or the Virgin Islands. *See United States v. Ntreh*, 279 F.3d 255, 256 (3d Cir. 2002) (relying on the *Insular Cases* to rule that, "[a]s a preliminary matter, we note that residents of the Virgin Islands have no constitutional right to indictment by a grand jury"). Ironically, a United States citizen is afforded *more* constitutional rights when she visits or resides in a foreign country than when she is in a United States territory. *See Reid*, 354 U.S. at 11-14, 23 (holding that U.S. citizen spouses of U.S. military personnel residing on military bases overseas must be tried by Article III courts with the right to indictment and trial by jury, as opposed to military courts-martial).

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This affront to judicial independence can manifest itself in concrete ways. For example, although President George H. W. Bush appointed Judge Moore to the District Court of the Virgin Islands in 1992 and Moore is willing to continue to serve after his ten-year term expired last June 30,[11] he has not been reappointed.[12] The media have widely attributed Moore's non-reappointment to his rulings against the United States and various influential entities

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Congress also subjects territorial residents and visitors to daily indignities it does not impose on travelers in the continental United States, Alaska, and Hawaii. Specifically, Congress treats all persons traveling from the United States Virgin Islands to the mainland, including United States citizens, as aliens who must satisfy an immigration inspector of their right to be admitted to the continental United States. *See United States v. Pollard*, 209 F. Supp. 2d 525 (D.V.I. 2002), *appeal filed* (3d Cir. July 17, 2002). Further, the Court of Appeals for the Third Circuit has held that the Fourth Amendment, although made applicable to the Virgin Islands by Congress, does not bar the United States from subjecting all travelers from Virgin Islands airports to the continental United States, again including citizens, to warrantless customs border examinations and searches. *See United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994) (holding that *Downes v. Bidwell* gave Congress the right to create a one-way "customs border" between the Virgin Islands and the rest of the United States), *rev'g*, Crim. No. 1993-65, 1993 WL 733094 (D.V.I. Oct. 21, 1993) (Moore, C.J.).

[11] *See* REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 24(a); 48 U.S.C. §§ 1614(a) ("The President shall, by and with the advice and consent of the Senate, appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of ten years and until their successors are chosen and qualified, unless sooner removed by the President for cause. . . . The salary of a judge of the district court shall be at the rate prescribed for judges of the United States district courts."), 1424b(a) (Guam), 1821(b) (CNMI).

[12] Ironically, knowledge that one will not be reappointed would be almost as sure a guarantee of independence as life tenure.

and persons in the Virgin Islands.[13] Even if Moore's decisions are not the reason he has not been reappointed, the mere appearance that these may be the cause is equally as damaging, as it undermines the public's confidence in the court's impartiality.

II. THE SUPREME COURT DETERMINES WHETHER THE TERRITORIAL JUDGES OF THE DISTRICT COURTS OF GUAM, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS ARE ARTICLE III JUDGES

Contrary to the position argued by petitioners, any impediment to the remaining four territorial judges

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[13] It has been suggested that one of Moore's decisions requiring the United States to comply with the Constitution has rankled the Executive. *See* Michelle Charles & Will Jones, *Reappointment not Certain for District Court Judge*, THE AVIS, Aug. 22, 2002, at 1-2 (implying that Judge Moore may not be reappointed because "[he] may have made U.S. Justice Department officials in Washington unhappy when he recently declared in a ruling that the immigration checkpoints at [the St. Thomas airport] were unconstitutional and the practice was a form of unlawful search and seizure") (referring to *United States v. Pollard*).

The online local newspaper has reported that the Executive's decision not to reappoint Judge Moore may be due to Moore's rulings against the interests of a local business magnate with apparent ties to the White House. *See* Frank J. Jordan, Moore Won't be Nominated for 2d Court Term, ST. THOMAS SOURCE, at http://new.onepaper.com/stthomasvi/?v=d&i=&s=News:Local&p=54411 (Aug. 29, 2002); Editorial, *Politics Appears to Rule over Performance*, ST. THOMAS SOURCE, at http://new.onepaper.com/stthomasvi/?v=d&i=&s=Commentary:Editorials&p=54500 (Aug. 30, 2002); *see also* Frank J. Jordan, *No Reappointment Yet for Federal Judge Moore*, ST. THOMAS SOURCE, at http://new.onepaper.com/ stthomasvi/?v=d&i=&s=News:Local&p=52584 (July 3, 2002).

exercising the judicial power of the United States under Article III has been swept aside by this Court in *Glidden Co. v. Zdanok*. Moreover, *Glidden* stands for the proposition that this Court can declare that the four judges of Guam, the CNMI, and the Virgin Islands exercise the judicial power of the United States with all the protections of Article III of the Constitution.

As discussed in *Glidden*, Congress originally created the Court of Claims and the Court of Customs and Patent Appeals to carry out its legislative functions to pay the debts of the United States and to collect taxes and duties. In 1929, this Court had ruled that the latter was a legislative tribunal created by Congress under its Article I power to lay and collect duties on imports, even though Congress had set no limit on the length of the terms of its judges. *Ex parte Bakelite Corp.*, 279 U.S. 438, 458-59 (1929). Four years later, this Court ruled that the Court of Claims was an Article I court created as a special tribunal to carry out Congress's function of determining claims for money against the United States incident to its power to pay the debts of the federal government, even though its judges held office during good behavior by the grace of Congress. *Williams v. United States*, 289 U.S. 553, 562, 568-69 (1933). In 1953 and 1958, Congress attempted to overrule this Court's *Bakelite* and *Williams* decisions by expressly declaring the Court of Claims and the Court of Customs and Patent Appeals, respectively, to be under Article III.

The very same argument raised by the petitioners here was presented in *Glidden*; namely, that non-Article III judges from these two courts could not be designated to

sit on United States courts constituted under Article III of the Constitution. A majority of five Justices[14] joined in declaring that the judges in question were actually Article III judges, even though they had been appointed under Article I. The plurality of Justices Harlan, Brennan, and Stewart found that the judges had been Article III judges all along because *Bakelite* and *Williams* were wrongly decided, noting that "Congress may not by fiat overturn the constitutional decisions of this Court." *Glidden*, 370 U.S. at 541. The two concurring members, Justice Clark and Chief Justice Warren, reached the same result without disturbing *Bakelite* and *Williams*. Their position was that action by Congress after *Bakelite* and *Williams* not only clarified Congress's intent that the courts be Article III courts, but also expanded the courts' jurisdiction, so that by the time of *Glidden*, "practically all of the court[s'] jurisdiction [was] composed of Article III cases." *Id.* at 586-87 (Clark, J., concurring). Justice Douglas agreed with the plurality that this Court is the "expositor of the meaning of the Constitution, and a congressional enactment in the field of Article III is entitled to no greater weight than in other areas." *Id.* at 602 (Douglas, J., dissenting) (citations omitted).[15]

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[14] Justices Frankfurter and White did not participate in the decision.

[15] Justices Douglas and Black dissented, arguing that the judges and the courts on which they served exercised jurisdiction that far exceeded the constitutional limitations on the judicial power of the United States imposed by Article III. Indeed, the troublesome aspect for all the Justices in *Glidden* was the non-Article III jurisdiction vested in the two courts. Examples of such non-Article III jurisdiction were the power of the Court of Customs and Patent Appeals to review Tariff Commission findings of unfair practices in import trade and the

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This Court in *Glidden* explained away Chief Justice Marshall's statement in *Canter* that the "judicial Power of the United States" in Article III cannot be exercised by Congressionally established legislative courts in the territories or elsewhere.

> All the Chief Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

Glidden, 370 U.S. at 544-45 (plurality opinion) (footnote omitted).

This Court readily acknowledged that "[f]ar from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts." *Id.* The plurality noted the practical factors affecting the early territories, such as a surplus of federal judges once a territory became a state and the isolation of the territorial governments from Washington, D.C., that reduced the urgency for territorial federal

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congressional reference jurisdiction given the Court of Claims. Another concern was whether cases in which the United States was a defendant and would be immune from execution on a judgment rendered against it were "justiciable" under Article III. *See Glidden*, 370 U.S. at 562-71 (plurality opinion); *id.* at 597-98 (Douglas, J., dissenting). Such concerns have no relevance to the four territorial judges.

judges to enjoy Article III independence from Congress. Given modern communications and the evolution of the jurisdiction of the territorial district judges to that of the Article III jurisdiction of a United States district court, these practical difficulties no longer present any basis for denying tenure during good behavior to the territorial judges.

The "same confluence of practical considerations that dictated the result in *Canter*" also dictated more flexibility in dealing with the governance and application of Article III to the unincorporated territories outside the mainland. "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. . . . When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling." *Id.* at 547-48 (plurality) (citing *O'Donoghue v. United States*, 289 U.S. 516, at 536-39 (1933) (other citations omitted)).

The federal judges and courts in the unincorporated territories of the Virgin Islands, Guam, and the CNMI are no less permanent than the judges and courts involved in *Glidden*, the United States District Court and Court of Appeals in the District of Columbia, or even an Article III court in any of the fifty states. The analysis may be slightly different but the result is the same. A United States district court established in a State under Article III can be abolished by legislation in a later Congress, for Article III itself only vests the judicial power of the United States "in such inferior Courts as Congress may from time to time ordain and establish." As this Court noted about the permanency of the Court of Claims and Court of Customs and Patent Appeals, "the threat thus facing their

independence is not in kind or effect different from that sustained by all inferior [Article III] federal courts." *Id.* at 551 (plurality opinion).

III. THE TERRITORIAL JUDGES ARE *DE FACTO* ARTICLE III JUDGES WHO PRESENTLY EXERCISE ARTICLE III JUDICIAL POWER

The judge of the District Court of Guam, the judges of the District Court of the Virgin Islands, and the judge of the District Court of the Northern Mariana Islands all exercise "the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28, United States Code, and that of a bankruptcy court of the United States." 48 U.S.C. §§ 1421(a) (Guam), 1612(a)(VI), 1822(a) (CNMI).[16]

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[16] Only the judges of the District Court of the Virgin Islands perform any appellate role over a local court. *See* REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 23A(a), 48 U.S.C. § 1613a(a). Since the U.S. District Court for the District of Columbia exercised both federal and general local jurisdiction at the time the Supreme Court decided it was an Article III court, *see O'Donoghue*, 289 U.S. at 545-48, there is no reason after *Glidden* that the U.S. District Court for the District of the Virgin Islands cannot continue to exercise this role. The Virgin Islands territorial judges also have a residual or "supplemental" concurrent jurisdiction over those local criminal offenses that grow out of conduct that also offends the federal criminal law. *See* REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 22(c), 48 U.S.C. § 1612(c). There is no reason for this anachronistic concurrent jurisdiction to continue, and its elimination would further the autonomy of both the local and federal trial courts in the Virgin Islands. Most importantly, Congress has vested no executive, administrative, or legislative powers in the judges of the District Court of the Virgin Islands or in any of the other territorial judges. Hence there is even less reason for concern here than there was in

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According to the criteria collectively established by all seven of the Justices who participated in *Glidden*, the territorial judges are *de facto* Article III judges. As required by the plurality, the territorial judges operate under establishing legislation that incorporates the limitations of Article III. Their business is the federal business specified in Article III.

> [W]hether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite.

Glidden, 370 U.S. at 552 (plurality opinion of Harlan, Brennan and Stewart, JJ.).

O'Donoghue, as the residual functions the territorial judges exercise are obviously judicial in nature.

The judges of the territorial district courts would continue to exercise a unique kind of federal jurisdiction, e.g., "exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the [U.S.] income tax laws applicable to the Virgin Islands, . . . except [those] enacted by the legislature of the Virgin Islands." REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 22(a), 48 U.S.C. § 1612(a); *cf.* ORG. ACT OF GUAM, 48 U.S.C. § 1421i(a)-(h); COVENANT TO ESTABLISH COMMONWEALTH OF NORTHERN MARIANA ISLANDS art. VI, *reprinted as note to* 48 U.S.C. § 1801. Being federal in nature, this jurisdiction would remain exclusively in the U.S. district courts for the Virgin Islands, Guam, and the CNMI. *See, e.g.*, *Danbury, Inc. v. Olive*, 820 F.2d 618, 622 (3d Cir. 1987) ("This proviso implements Congress's stated goal of depositing proceeds from the U.S. income tax into the treasury of the Virgin Islands.").

As required by the concurrence, the territorial judges exercise jurisdiction only over justiciable matters, issue final judgments, and are judges appointed by the President with consent of the Senate.

> [J]urisdiction over justiciable matters, issuance of final judgments, judges appointed by the President with consent of the Senate. . . . And . . . [an] unequivocal[ ] express[ion of] Congress' intent that [the court] . . . should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges.

Id. at 586-87 (Clark, J., concurring).

The territorial judges even satisfy the criteria of the dissent, in that they have the power to adjudicate any cause brought in a suit filed according to the regular course of judicial procedure and the power to enter a judgment and enforce it. They submit to no revisory or appellate power in the executive or legislative branches of government.

> [D]ecisions of this Court clearly condition the power to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, [and] the absence of revisory or appellate power in any other branch of Government. . . .

Id. at 601 n.6 (Douglas, J., dissenting) (citations omitted).

The dissenting Justices in *Glidden* would require the appointing President to know that these judges would be exercising all the powers of an Article III court, for "[a]n

appointment is made by the President and confirmed by the Senate in light of the duties of the particular office," and "[f]ederal judges named to Article III courts are picked in light of the functions entrusted to them." *Id.* at 603, 604.

> Judges who do not perform Article III functions, who do not enjoy constitutional tenure and whose salaries are not constitutionally protected against diminution during their term of office cannot be Article III judges.
>
> Judges who perform 'judicial' functions on Article I courts do not adjudicate 'cases' or 'controversies' in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.
>
> Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and ex post facto laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

Id. at 606.

The territorial judges meet all these criteria, with the exception of life tenure and protected compensation. They all have been appointed by the President to exercise Article III authority and have been performing the duties of Article III judges with the full and equivalent jurisdiction of Article III United States district courts. Each appointing President knew that these judges would be

exercising all the powers of an Article III court and chose them for their "qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and ex post facto laws, were designed." The respective appointing Presidents selected them for their qualifications to exercise the Article III power of the United States, regardless of the length of their terms.[17] The present judges of the territorial district courts have always adjudicated the same Article III "cases" and "controversies" that any and every United States district court judge presides over in the fifty states. They also are statutorily bound by the requirements of the Seventh Amendment concerning trial by jury.

The four territorial judges were selected, investigated, and nominated by the President to perform the identical functions performed by any Article III judge on any United States District Court. They were subjected to the same in-depth background investigation by the Federal Bureau of Investigation, evaluated by the same committee of the American Bar Association, and investigated by the same Senate Judiciary Committee. They were confirmed by the Senate on the understanding that each one would be exercising the full powers of Article III judges, and they

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[17] During their terms, the incumbent judges may be removed from office by the President only "for cause," e.g., REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 24(a), 48 U.S.C. § 1614(a), which guarantees due process, just as an Article III judge can only be removed by the impeachment process, U.S. CONST. art. II, § 4.

have been exercising this authority during their entire tenure as territorial district judges.

The territorial judges are Article III judges in everything but name. As the arbiter of Article III, this Court can declare these *de facto* Article III judges to be *de jure* United States district judges by overruling the *Insular Cases*' misguided finding that Article III does not apply to the unincorporated territories or possessions. This declaration will simply recognize that these judges were nominated and confirmed to perform the duties of Article III judges on courts with the full and equivalent jurisdiction of courts established under the judicial power of the United States, just as Congress "renounc[ed] its power to terminate the functions or reduce the tenure or salary of the judges of the courts" at issue in *Glidden*. 370 U.S. at 589 (Clark, J., concurring). It follows that Congress constitutionally cannot anoint the territorial judges with the judicial power of the United States without also cloaking them with the independence Article III requires.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be upheld because territorial judge Alex Munson exercises the judicial power of the United States pursuant to Article III of the Constitution.

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